SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

03/13/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

LC 2001-000631

FILED: _____

STATE OF ARIZONA SAMUEL K LESLEY

v.

GERALD ARDEN WILLIAMS GERALD ARDEN WILLIAMS
1818 W SELDON LN
PHOENIX AZ 85021-0000

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5853707

Charge: 1. D.U.I.
2. DUI W/AC OF .10 OR HIGHER
3. SPEED NOT REASONABLE AND PRUDENT

DOB: 01/20/61

DOC: 11/02/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section

12-124(A). This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Phoenix Municipal Court and the memoranda submitted by the parties.

This matter comes before this Court on a stipulation of facts, which may be summarized as follows. At approximately 8:42 p.m. on November 2, 2000, Appellant Gerald Williams turned off Seventh Avenue into a neighborhood restricted to local traffic. Phoenix police officers Morgan and Simonick were monitoring traffic in this neighborhood and signaled for Appellant to stop after their radar unit indicated Appellant was driving 43 m.p.h. in a 25 m.p.h. zone. Officer Simonick asked Appellant if he knew why he was stopped and Appellant answered that he thought it was due to the street restriction. Officer Simonick asked Appellant what the speed limit was and Appellant replied that it was 25 m.p.h. The police officer then asked Appellant if he knew how fast he was driving and Appellant said he did not know.

Officer Simonick asked Appellant to step out of the car and began to perform an HGN test. Appellant asked the police officer if he was performing this test and, when Officer Simonick replied that he was, replied that he did not want the officer to administer the HGN test and that he was an attorney. Appellant also refused to submit to a field sobriety test. Officer Simonick told Appellant that he had no choice but to place Appellant under arrest for driving under the influence.

At 8:56 p.m., Appellant asked to call his attorney on his cellular phone and his handcuffs were removed for that purpose. One of the police officers told Appellant he could leave a call back number on his attorney's answering machine. The officer also informed Appellant that he could call an attorney later if he wanted to.

At 9:12 p.m., one of the officers read Appellant his *Miranda* rights, which Appellant invoked. Appellant was cited

for violating A.R.S. § 28-1381(A)(1), Driving While Under the Influence, A.R.S. § 28-1381(A)(2), Driving With an Alcohol Concentration Greater than .10, and A.R.S. § 28-71(A), Speed Not Reasonable and Prudent. He was also informed of his right to arrange and pay for an independent chemical test and of the implied consent law. Appellant initially refused to take the breathalyzer test.

Appellant made several additional telephone calls at 9:22 p.m. and 9:23 p.m., but refused to give the numbers to the police officers to be logged. By this time, the DUI van had arrived. Appellant agreed to take the breathalyzer test and the first test was administered at 9:42 p.m. Shortly thereafter, Appellant's brother, also an attorney, arrived and asked to speak with Appellant. At this point, the facts diverge. Appellant claims that the officer performing the test, Officer Campbell, refused to allow him any contact with his attorney. Appellee alleges that Officer Campbell advised both Appellant and his brother that they could speak with each other, but not privately because the deprivation period precluded Appellant from being out of Officer Campbell's sight. Additionally, Officer Campbell was needed at for another DUI processing elsewhere. Appellant took a second breath test at 9:49 p.m. He was released into his attorney's custody at 10:00 p.m.

Prior to trial, the parties agreed to a stipulation of facts. However, there were certain facts upon which the parties could not agree, including whether the police officers had denied Appellant all access to his attorney after the latter arrived on the scene or whether they only told Appellant and his attorney they could not speak outside the officer's hearing.[1] At the first hearing on this matter the parties agreed that those facts upon which they could not agree were not relevant to deciding this case.[2] The trial court later denied Appellant's motion to dismiss the case or to suppress the test results and found Appellant guilty on all counts.

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[1] Audio Transcript of May 8, 2001.

[2] *Id.*

As both parties agree, the standard of review of a ruling on a motion to dismiss or to suppress evidence is whether the trial court abused its discretion.[3] The appellate court must defer to the trial court's factual findings that are supported by the record and are not clearly erroneous.[4]

The accused in a DUI case has a "qualified due process right" to obtain evidence independently while it is still available.[5] The right to counsel during the DUI investigation is part of this right.[6] However, the access the accused has to counsel during the investigation is qualified because it is available only to the extent "the exercise of that right does not unduly delay or interfere with the law enforcement investigation."[7]

Courts have held that the right of the accused to counsel has been violated where police prevented the accused from contacting an attorney.[8] Similarly, if the police refuse to allow the accused to leave a call back number so that his attorney may contact him during the investigation, the accused's right to counsel has been violated.[9] On the other hand, the accused has a right to speak privately with his attorney, but only if this does not affect the investigation or the accuracy of the second breath test.[10]

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[3] State v. Rosengren, 199 Ariz. 112, 115, 14 P.3d 303, 306-07 (2000). See also, State v. Carter, 145 Ariz. 101, 110, 700 P.2d 488, 497 (1985); State v. Pecard, 196 Ariz. 311, 998 P.2d ____, (App. 1999).

[4] State v. Rosengren, 199 Ariz. at 116, 14 P.3d at 308, Mack v. Cruikshank, 196 Ariz. 541, 2 P.3d 100, (App. 1999).

[5] State v. Rosengren, 199 Ariz. at 117, 14 P.3d at 309; See also, Kunzler v. Pima County Superior Court, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987); State v. Holland, 147 Ariz. 453, 711 P.2d 602 (1985); State ex rel. Webb v. City Court, 25 Ariz. App. 214, 216, 542 P.2d 407, 408 (1975).

[6] State v. Rosengren, 199 Ariz. at 117; 14 P.3d at 308, State v. Transon, 186 Ariz. 482, 485; 924 P.2d 486, 489 (App. 1996).

[7] State v. Rosengren, 199 Ariz. at 117, 14 P.3d at 308. See also, State v. Sanders, 194 Ariz. 156, 157, 978 P.2d 133, 134 (1998); McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982).

[8] Id., 133 Ariz at 9, 648 P.2d at 124; State v. Keyonnie, 181 Ariz. 485, 486, 892 P.2d 205, 206 (1995).

[9] State v. Sanders, 194 Ariz. at 158, 978 P.2d at 135.

[10] State v. Holland, 147 Ariz. at 456, 711 P.2d at 605.

As the court in ***Holland*** states in dicta, the qualified right of the accused to consult with an attorney is based in part on whether the accuracy of the second breath test will be affected.[11] In ***Holland***, the court held that the police officer improperly refused to allow the accused to speak with his attorney on the telephone during the deprivation period because the officer could have moved to a position in the room from which he could continue to observe the accused but could not overhear the telephone call.[12] Here, allowing Appellant and his attorney to speak out of Officer Campbell's sight would have tainted the deprivation period and thus the breath test. As in ***Holland***, allowing Appellant and his attorney to speak privately but where the officer could continue to watch Appellant would not have affected the deprivation period and thus the test administration.

The police officers involved in this case gave Appellant several opportunities to speak to his attorney. Appellant was allowed to make numerous private telephone calls on his cell phone. The officers also provided him with a call back number to leave on his attorney's answering machine so that the attorney could return Appellant's call. However, the facts are not clear whether the police officers barred Appellant from all contact with his attorney when the latter arrived at the scene during the deprivation period, or if they only told Appellant and his attorney that they could speak but had to remain within the officer's line of vision.[13] The trial court appears to have chosen to believe Appellee's version of this event. The trial court's weighing of evidence in this matter was clearly not an abuse of discretion as substantial evidence exists in the form of the police officer's testimony which

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[11] *Id.*

[12] *Id.*

[13] During the deprivation period, the observing officer is required to ensure that the "subject has not ingested any alcoholic beverages or other fluids, vomited, eaten, smoked or placed any foreign object in the mouth." A.A.C. R.9-14-401(8).

supports the denial of Appellant's Motion to Dismiss or Suppress.

IT IS THEREFORE ORDERED affirming the judgment of the Phoenix Municipal Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix Municipal Court for all further and future proceedings.